Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

NO. 79-582

STATE OF COLORADO, AIMS JUNIOR COLLEGE DISTRICT COMMITTEE, and COLORADO MOUNTAIN COLLEGE JUNIOR COLLEGE DISTRICT,

Petitioners,

v.

VETERANS ADMINISTRATION, RICHARD L. ROUDEBUSH, FRANK NEWTON, and R. C. FOX,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October , 1979

INDEX

	Page
Opinion below	2
Jurisdiction	2
Questions presented	2
Statutory provisions involved	4
Statement of the Case	4
Reasons for granting the writ	10
1. The decision of the Tenth Circuit conflicts with the basic principles enunciated by this Court	10
2. The decision below addresses significant and recurring problems of considerable practical importance in the administration of the veterans educational assistance programs and the judicial system of the United States	15
Conclusion	22
Appendix	App 1
Opinion and Judgment of the Court of Appeals	App.1
Text of 38 U.S.C. § 1771	App.14
Text of 38 U.S.C. § 1774 (a)	App.15
Text of 38 U.S.C. § 1782	App.16
Text of 38 U.S.C. § 1785	App.17

Text of 38 U.S.C. § 3102 (d)..... App.18
Text of Colo. Rev. Stat.
§23-60-303(2) (1973)..... App.19

CITATIONS

CASES:

Elrod v. Burns, 427 U.S. 347 (1976)..... 14
Goldberg v. Kelly, 397 U.S. 254 (1970)... 14
McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819)..... 12
National League of Cities v. Usery, 426 U.S. 833 (1976) 12,13
Oregon v. Mitchell, 400 U.S. 112 (1970)...12
Plato v. Roudebush, 397 F. Supp. 1295 (D. Md. 1973).....15
Sherbert v. Verner, 374 U.S. 398 (1963)..14
State of Colorado v. Veterans' Administration, 430 F. Supp. 551 (D. Colo. 1977)..... 2,10
Townsend v. Sain, 404 U.S. 282 (1971)....12

STATUTES:

5 U.S.C. §§501 et seq..... 3,8
27 U.S.C. §1254 (1).....2
28 U.S.C. § 1331.....5
38 U.S.C. §1771.....3,4
38 U.S.C. §1774.....3,4
38 U.S.C. §1782.....3,4,8,9,17
38 U.S.C. §1785..... 2,3,4,7,8,9
38 U.S.C. § 3102 (d)..... 3,4,9,10

Colo. Rev. Stat. § 23-60-303(2)(1973).....4

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The Petitioners State of Colorado, Aims Junior College District Committee and Colorado Mountain College Junior College District respectfully pray that a writ of certiorari issue to review the

judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on July 11, 1979.

OPINION BELOW

The opinion of the Court of Appeals is not reported and appears in the Appendix hereto. The Memorandum Opinion, Findings, Conclusions and Order of the District Court is reported and appears at 430 F. Supp. 551.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on July 11, 1979, affirming with modifications the order of the District Court for the District of Colorado, and this petition for a writ of certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 27 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether 38 U.S.C. § 1785 is unconstitutional on its face because the Cong-

ress lacks the constituional power to impose liability upon institutions of higher education for failure to acquire and transmit certain information to the Veterans' Administration, and because the statute violates due process.

2. Whether 38 U.S.C. § 1785 is unconstitutional as applied to the Petitioners herein because it violates the doctrine of governmental immunity.

3. Whether Petitioners surrendered their constitutional rights because of the establishment of a state approving agency under 38 U.S.C. §§ 1771 and 1774.

4. Whether the administrative policies imposed by the Veterans' Administration upon institutions of higher education violate Petitioners' right to due process, 38 U.S.C. § 1782, 38 U.S.C. § 3102(d), and the requirements of the Administrative Procedure Act, 5 U.S.C. §§ 501 et seq.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 38

Section 1771. Scope of approval

Section 1774 (a). Reimbursement of expenses

Section 1782. Control by agencies of the United States

Section 1785. Overpayments to eligible persons or veterans

Section 3102 (d). Waiver of recovery of claims by the United Sates

Colorado Revised Statutes (1973)

Section 23-60-303(2)

The verbatim texts of these statutory provisions are set forth in the Appendix hereto.

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked because a question arises under the Constitution and laws of the United States, the action

is brought against an agency and officers of the United States, and the amount in controversy exceeds $ 10,000, exclusive of interest and costs. 28 U.S.C. § 1331.

The Veterans' Administration and its officers administer a program of benefits authorized by Congress to assist veterans and other eligible persons in furthering their education, including educational assistance and special training allowances. These benefits are paid directly to veterans and eligible persons; they are not paid to or through the Petitioners or other institutions of higher education.

Among the prerequisites to veteran eligibility for educational assistance and special training allowances are the requirements that the educational institution attended, the educational program pursued, and the courses taken by the veteran have been approved in accordance with statute and regulation. This approval function can be performed

directly by the Veterans' Administration or through an authorized state approving agency as in Colorado. This agency performs the approval function for the Veterans' Administration under a contract. This contract is between the Veterans' Administration and the state approving agency only, and relates to approval of institutions, their programs, and courses only, not to the eligibility of the individual veterans.

In order to determine the eligibility and entitlement of individual veterans to educational assistance and special training allowances, the Veterans' Administration utilizes information provided by the veterans and by the institutions of higher education. Sometimes the Veterans' Administration pays allowances to persons not entitled to such payments according to the statute and regulations. Such payments are denominated "overpayments". The recipient is responsible to repay

such overpayments to the Veterans' Administration. The Veterans' Administration maintains that under 38 U.S.C. § 1785, the institutions of higher education are also liable for such overpayments under certain circumstances. Even where the Veterans' Administration has waived collection from the offending student, it seeks to collect the overpayment from the institution.

The Veterans' Administration made demand from Colorado educational institutions to repay certain overpayments pursuant to 38 U.S.C. § 1785. Administrative proceedings were undertaken to determine Petitioners' liability for, and the amount of, overpayments to be repaid to the Veterans' Administration. Shortly before the instant suit was filed, the Veterans' Administration had determined 1,393 claims against Colorado state educational institutions

and two public junior college districts (the Petitioners herein). The total amount claimed by the Veterans' Administration was $ 1,414,054.51.

On November 17, 1976, the State of Colorado, on behalf of its state institutions of higher education, Aims Junior College District Committee and Colorado Mountain College Junior College District commenced an action seeking a declaratory judgment that 38 U.S.C. § 1785 is unconstitutional on its face and as applied to Petitioners; that the regulations of Respondents violate 38 U.S.C. § 1782; that Respondents' procedures for determining liability must conform to the provisions of the Administrative Procedure Act, 5 U.S.C. §§ 501 et seq.; and that the assertion of an overpayment liability against Petitioners while waiving liability against the offending students violates

38 U.S.C. § 3102 (d). In addition, Petitioners sought to enjoin the Respondents from initiating or continuing proceedings under 38 U.S.C. § 1785 to determine or collect purported overpayments from the Petitioners, and from collecting or attempting to collect any purported overpayments from Petitioners.

Petitioners' motions for a temporary restraining order and preliminary injunction were denied after a hearing. On December 8, 1976, an amended complaint for declaratory relief only was filed, which Respondents answered.

A trial to the court was held and the district court entered an order which, among other things, held that 38 U.S.C. § 1785 was constitutionsl, that the practices of the Veterans' Administration did not violate 38 U.S.C. § 1782, that the administrative proceedings to determine liabilities for

overpayments must conform with the requirements of the Administrative Procedure Act, and that the practices of the Veterans' Administration do not violate 38 U.S.C. § 3102 (d). The court based its decision in part upon the finding of a contractual liability for overpayments flowing from the educational institutions to the Veterans' Administration through the state approving agency contract with the Veterans' Administration. 430 F. Supp. at 558.

The Tenth Circuit affirmed with modifications, altering the district court's order and judgment insofar as it required that the Veterans' Administration administrative procedures comply with the Administrative Procedure Act.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE TENTH CIRCUIT CONFLICTS WITH THE

BASIC PRINCIPLES ENUNCIATED BY THIS COURT

The interpretation of the Veterans' Readjustment Benefits Act of 1966, as amended, as it is applied to educational institutions is a matter of first impression in this suit. Although there is no direct conflict with any other circuits, the decision of the Tenth Circuit conflicts with certain fundamental tenets of law enunciated by this Court.

The Tenth Circuit has determined that because a student receives a subsidy, the state institution which the student attends is bound by all of the terms of the statutes and regulations at issue herein, regardless of their legality. This Court has found that once a subsidy has been accepted on specific terms, those terms are enforceable against the recipient, here the student,

but it has not found those terms to be enforceable against non-recipients, such as the schools here. Townsend v. Sain, 404 U.S. 282 (1971).

The Tenth Circuit expands the determinations of this Court beyond all constitutional bounds, and binds non-recipient schools. There are no powers enabling the Congress, or the Tenth Circuit, to do this. The enumerated powers set forth the parameters of Congress' prerogatives. Mc Culloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819); Oregon v. Mitchell, 400 U.S. 112 (1970). While the spending power allows Congress to subsidize veterans, there is no power to collect those subsidies from the schools. In holding otherwise, the Tenth Circuit conflicts with the basic principles enunciated in these cases.

Similarly, this Court has recently reviewed the doctrine of intergovernmental immunity in National League of

Cities v. Usery, 426 U.S. 833 (1976), which invalidated Congress' extension of the wage and hour provisions of the Fair Labor Standards Act to employees of state and local governments. Here, there is a simialr intrusion into state managerial and fiscal matters as in Usery. There is a significant financial detriment to the state schools, governmental agencies, and a displacement of their discretion in structuring the delivery of its educational services. Liability can be avoided only if schools yield to the Veterans' Administration's demands, and alter their educational and administrative policies for enrollment and progress of students. In a situation analogous to the one here, Usery prohibits the Congress from intruding into the functioning of state governmental bodies.

The Tenth Circuit makes no attempt to reconcile its decision with those of

this Court. Rather, the Tenth Circuit relies on an "acceptance" theory to justify its decision. Here, the Tenth Circuit states that because the state has designated a state approving agency which has a contract to carry out the functions of the Veterans' Administration in approving schools, it has surrendered all constitutional rights and acquiesced in whatever regulations and penalties established by the Congress, regardless of their legality. This contradicts fundamental principles established in the decisions of this Court including Goldberg v. Kelly, 397 U.S. 254 (1970), Sherbert v. Verner, 374 U.S. 398 (1963), and more recently in Elrod v. Burns, 427 U.S. 347 (1976), which have determined that the surrender of constitutional and statutory rights cannot be made a condition for eligibility for unemployment compensation, continued employment or welfare. Thus, the state

schools cannot be required to give up their rights to due process, intergovernmental immunity or application of the Administrative Procedure Act, for example, as a condition of participation in the veterans education assistance programs. See also, Plato v. Roudebush, 397 F.Supp. 1295 (D. Md. 1973).

Thus, the Tenth Circuit's determination that the state schools have in effect surrendered their constitutional and statutory rights, and are bound by a scheme of the Veterans' Administration concerning overpayments collides with fundamental tenets enunciated by this Court.

2. THE DECISION BELOW ADDRESSES SIGNIFICANT AND RECURRING PROBLEMS OF CONSIDERABLE PRACTICAL IMPORTANCE IN THE ADMINISTRATION OF THE

VETERANS EDUCATIONAL ASSISTANCE PROGRAMS AND THE JUDICIAL SYSTEM OF THE UNITED STATES

The Tenth Circuit opinion in this case reflects a policy determination that has ramifications for all institutions of higher education, and there are compelling reasons why a definitive interpretation of the relationship between the Veterans' Administration and educational institutions by this Court should be provided. The interpretation of the statutes and regulations at issue herein, to create contractual obligations, articulated by the Tenth Circuit raises important issues of federal law and of procedure. State educational institutions and courts which will hear future claims collection actions are urgently in need of the assistance of this Court in understanding the policy

and application of the statutes at issue.

The statutes, including 38 U.S.C. § 1782 explicitly state that the Veterans' Administration shall not exercise control or supervision over educational institutions. The school are to be the exclusive arbiters of their educational policies. While the Veterans' Adminostration, or its agent the state approving agency, can approve or disapprove the school for Veterans Administration participation, it cannot thrust its hand into the operation and direct the school to follow certain systems of administration and education. The decision of the Tenth Circuit ignores the specific mandate of the statutes when it holds that a contract between the state approving agency and the Veterans' Administration binds the non-contracting schools to the unlawful actions of the Veterans' Administration.

The decision rests squarely on the

contract between the state approving agenc y and the Veterans' Administration, and the Tenth Circuit concludes that the schools have adopted all laws and regulations as a result; they forfeit their rights to constitutional and legal administration. This is clearly erroneous. In addition, such a decision could not be reached where a state has not created or designated a state approving agency. Thus, the Tenth Circuit's opinion draws a distinction between schools in states with an approving agency and those with none, which is arbitrary and improper. In addition, private institutions may be bound by this contract between the state approving agency and the Veterans' Administration.

The position of the Tenth Circuit has widespread implications for states and their educational institutions, and drastically alters the way they must administer their educational

programs. There are several similar cases now pending in other jurisdictions. The School Committee of the City of Portland, et al. v. Cleland, et al., Civ. 76-177-P (D.Me.); The Board of Regents of the State of Florida v. Veterans Administration, et al, TCA 77-0776 (N.D.Fla.).

The same issues will be raised in thousands of additional suits when the Veterans' Adminstration seeks to collect its claims. In Colorado alone there were originally over 1,400 claims. This multiplied by the fifty states could lead to 70,000 suits raising the same issues and involving millions of dollars. The issues raised herein have a definite fiscal impact on the states and are therefore of the utmost importance to the states. The questions remain ones of substantial importance to the schools, the states, and the public in the administration of this law for years to come.

The issues are novel and troublesome, and because of similar cases pending as well as numerous more to come, it is desireable to get an early and definitive ruling by this Court. The importance of the issues are continuing and the widespread litigation will continue until the points are settled by the Supreme Court.

The interpretation of the Tenth Circuit ignores the plain meaning of the statutes and reaches an unwarranted construction of the statute to save its constitutionality. It appears to prefer a policy which seriously hinders schools in their educational undertakings over a clear interpretation of the law. Under the system as approved by the Tenth Circuit, educational decisions to have "open enrollment" or pass- fail, or similar systems have to be forsaken in order to comply with

Veterans' Administration regulations, even though the school was approved as is.

The deep division between educational policy and administration and the Veterans' Administration policies needs the attention and resolution of this Court. The large number of cases looming on the horizon which will merely repeat the issues here, as well as the arbitrary distinctions inherent in the Tenth Circuit's opinion between states with approving agencies and those without, underscores the need for a thorough examination of the problem by this Court. The resolution of these questions will have immediate importance beyond the Petitioners here, and will affect and guide the action of all educational institutions in pursuing their educational programs.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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October, 1979

APPENDIX

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

NO. 77-2035

STATE OF COLORADO, AIMS JUNIOR COLLEGE DISTRICT COMMITTEE, and COLORADO MOUNTAIN COLLEGE JUNIOR COLLEGE DISTRICT, Plaintiffs-Appellees-Cross-Appellants, v. VETERANS ADMINISTRATION, Defendant-Appellant-Cross-Appellee, RICHARD L. ROUDEBUSH FRANK NEWTON, and R. C. FOX, Defendants-Cross-Appellees (Appellants in No. 77-1748).	Appeal from the United States District Court for the District of Colorado (D.C. #76-F-1114)

Harland F. Leathers, Special Assistant to the Assistant Attorney General, Civil Division, Department of Justice, Washington, D.C. (Barbara Allen Babcock, Assistant Attorney General, Joseph F. Dolan, United States Attorney, Morton Hollander, Chief, Appellate Division, with him on the Brief), for Appellant-Cross-Appellee, and Defendants-Cross-Appellees.

Deanna E. Hickman, Denver Colorado (Joseph N. deRaismes, First Assistant Attorney General, Human Resources Section, David E. Engdahl, Special Assistant Attorney General, J. D. MacFarlane, Attorney General, David W. Robbins, Deputy Attorney General, and Edward G. Donovan, Solicitor General, on the Brief), for Appellees-Cross-Appellants.

Before SETH, Chief Judge, BREITENSTEIN and HOLLOWAY, Circuit Judges.

SETH, Chief Judge.

This is a declaratory judgment action brought by the State of Colorado against the Administrator of the Veterans Administration challenging certain aspects of the Educational Assistance Program on constitutional grounds.

Both parties have appealed from portions of the judgment. The case involves a combination of contract obligations, state acts referring to and adopting federal statutes and regulations, and procedures of the Veterans Administration.

The facts, the proceedings, and the rulings are set out by the trial court in State of Colorado v. Veterans Administration, 430 F. Supp. 551. The details will not here be repeated as only a general outline seems to be necessary.

The trial court held that 38 U.S.C. § 1785 relating to the collection of "overpayments" by the VA was constitutional, that the Administrative Procedure Act should be followed on the claims, and that the decisions of the Veterans Administration Administrator under 38 U.S.C. § 1785 are judicially reviewable.

Benefits under the Educational Assistance Program were paid directly

to the student-veterans. These payments were to continue only so long as the student was entitled thereto by continuing to pursue the approved courses and by attending classes. The school handled none of the funds, but was required to furnish periodic reports as to whether the student was still enrolled in the approved courses and whether he was attending classes. 38 U.S.C. § 1784. The school was paid a fixed sum under the contract with the VA for reporting. The student receiving benefits was also obligated to report changes in status.

The problem here arises under 38 U.S.C. § 1785 which in substance provides that the VA can collect from the school "overpayments" made to the students. These, according to section 1785, are payments to a veteran after a school has failed to report excessive absences or after the student has discontinued the course. The section

recites that these "overpayments" may be collected or "... recovered in the same manner as any other debt due the United States." This section was amended by Public Law 95-202 (91 Stat. 1433) after the trial court decided the case.

The VA advised some forty-three Colorado schools that it had claims for "overpayments" against them in some 1,400 overpayment cases. The number of schools was later reduced to two, and the number and amount of claims has been substantially reduced. The state filed its amended complaint for a declaratory judgment directed to the constitutionality of the statute, and to the validity of the claims procedure.

It is apparent from the record, as the trial judge concluded, that the Colorado statute, C.R.S. 1973 § 23-60-303(2), adopts the Veterans Administration's Educational Assistance Program (Public

Law 89-358) and the agency regulations pertaining thereto (38 C.F.R. 21.4001-9 and 21.4138-4027). The state statute also created the State Approving Agency provided for in 38 U.S.C. §1771 to deal with the Veterans Administration, and to approve the school participation and programs of study for the eligible veterans. The State of Colorado entered into a contract with the Veterans Administration to formalize the state-federal joint operation of the Program. The contract, of itself, demonstrates the benefit to the state and the schools of the Program.

The trial court concluded, and we agree, that the duties of the schools arose primarily from the contract entered into with the VA by Colorado, with the adoption of the several federal statutory provisions and regulations relating to the Educational Assistance Program referred to above. These, of course, included the reporting requirements.

The Colorado statute referred to above was also a formal adoption of the Program with the statutory, contractual, and regulatory undertakings.

The case is thus basically a matter of basic contract law, as the trial court indicated. When the issues are so examined, we find no substance to the plaintiffs' claim of interference with the educational process in Colorado, and no basis for any claim of unconstitutionality. The trial court disposed of these contentions in its memorandum, and we agree with its analysis and conclusion on this issue.

The action also challenged the administrative procedure followed by the VA as to the claims. As to this issue, the situation has changed since the trial court considered these several issues. The basic section of the Act to which the parties have devoted most of their arguments, 38 U.S.C. § 1785, was thus amended

by Public Law 95-202 (91 Stat. 1433). The amendments increased the reporting fee payable to the schools and also eliminated a possible offset of "overpayments" against the reporting fees, payable to the schools, unless the liability for "overpayment" under section 1785 has not been contested by the school "... or has been upheld by a final decree of a court of appropriate jurisdiction." The amendment also stated that the Act did not require daily attendance records.

It must be stressed that 38 U.S.C. § 1785 requires that when a liability for overpayments has been determined administratively, then the VA must sue to collect. Thus the section states that an overpayment "... may be recovered in the same manner as any other debt due the United States." The procedure to sue would be pursuant to 28 U.S.C. § 1345 as in any other debt or claim.

In such a proceeding the school could raise whatever defenses it considered valid. The trial in our view would be de novo. The VA in its brief also takes this view of the trial on the claims. In this context the administrative proceedings appear to become somewhat less significant.

There is no statute here applicable which requires an agency "hearing" to be structured by the Administrative Procedure Act. The Act does not create a right to a hearing where none otherwise exists. It "... specifies the procedure to be followed when a hearing is required by some other statute." Sisselman v. Smith, 432 F.2d 750 (3d Cir.). 5 U.S.C. § 554(a) in part provides:

> "(a) This section applies, according to the provisions thereof, in every case of adjudication required by statutes to be determined

on the record after opportunity for an agency hearing, except to the extent that there is involved --

"(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;..."

We must hold that the statute here concerned does not contain some clear indication that an adversary hearing with the use of a record is required. There are no magic words, and we perhaps would not be quite as far as the opinion in Duquesne Light Co. v. EPA, 481 F.2d 1 (3d Cir.), which was a rulemaking case, but it describes at least a point of departure in there referring to what it describes as the "thaumaturgic language." See also Marathon Oil Co. v. EPA, 564 F.2d 1253(9th Cir.), where the court said in part that the determination "... does not rest on the presence or absence of

the magical phrase 'on the record.' Absent congressional intent to the contrary, it rests on the substantive character of the proceedings involved,"--thus those "needing special procedural safeguards." See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402. In Anaconda Co. v. Ruckelshaus, 482 F.2d 1301 (10th Cir.), as to the EPA proceedings, we said in a rulemaking context:

" The Administrative Procedure Act requires that there be an adjudicatory hearing only if the agency statute specifies that the particular rule-making hearings be 'on the record after opportunity for an agency hearing.' No such requirement is set forth in the Clean Air Act. Notwithstanding that these words are used in other sections of the

> Act, omission of them in § 10(c) is therefore significant. See Allegheny-Ludlum Steel Co., 406 U.S. 742,757, 92 S. Ct. 1941, 32 L. Ed. 2d. 453 (1972); 2 K. Davis Administrative Law Treatise § 13.08, at 225 (1958)."

See also Garvey v. Freeman, 397 F. 2d 600 (10th Cir.).

As we have see, 38 U.S.C. § 1785 does not provide for a "hearing," or a hearing "on the record" by the VA, and again the section expressly provides for a suit for collection at the end of the administrative road, and there is no setoff against reporting fees any longer. Under these circumstances, the Administrative Procedure Act is not applicable to the claims before the VA.

The issue of "review" of the VA determination likewise loses its significance when the requirement for a suit

to collect is examined once the right of setoff was expressly eliminated. Any right to review the agency determination is during the course of the suit brought by the United States to collect. It is now apparent that the Administrative Procedure Act provides no jurisdictional ingredients. Califano v. Sanders, 430 U.S. 99.

The state has urged that there is a fatal conflict between sections 1782 and 1785, but we find no such serious defect.

The case is affirmed with such modifications as are required by the determinations herein made.

38 U.S.C. 1771. Designation

(a) Unless otherwise established by the law of the State concerned, the chief executive of each States is requested to create or designate a State department or agency as the "State approving agency" for such State for the purposes of this chapter and chapters 34 and 35 of this title.

(b)(1) If any State fails or declines to create or designate a State approving agency, the provisions of this chapter which refer to the State approving agency shall, with respect to such State, be deemed to refer to the Administrator.

(2) In the case of courses subject to approval by the Administrator under section 1772 of this title, the provisions of this chapter which refer to a State approving agency shall be deemed to refer to the Administrator.

38 U.S.C. 1774(a). Reimbursement of expenses. (a) The Administrator is authorized to enter into contracts or agreements with State and local agencies to pay such State and local agencies for reasonable and necessary expenses of salary and travel incurred by employees of such agencies and an allowance for administrative expenses in accordance with the formula contained in subsection (b) of this section in (1) rendering necessary services in ascertaining the qualifications of educational institutions for furnishing courses of education to eligible persons or veterans under this chapter and chapters 34 and 35, and in the supervision of such educational institutions, and (2) furnishing, at the request of the Administrator, any other services in connection with this chapter and chapters 34 and 35. The administrator may also reimburse such agencies

for work performed by their subcontractors where such work has a direct relationship to the requirements of chapter 32, 34, 35,or 36 of this title; and has had the prior approval of the Administrator.

38 U.S.C. 1782 Control by agencies of the United States.

No department, agency, or officer of the United States, in carrying out this chapter, shall exercise any supervision or control, whatsoever, over any State approving agency, or State educational agency, or any educational institution. Nothing in this section shall be deemed to prevent any department, agency or officer of the United States from exercising any supervision or control which such department, agency, or officer is authorized by law to exercise over any Federal educational

institution or to prevent the furnishing of education under this chapter or chapter 34 or 35 of this title in any institution over which supervision or control is exercised by such other department, agency, or officer under authority of law.

38 U.S.C. 1785 Overpayments to eligible persons or veterans

Whenever the Administrator finds that an overpayment has been made to an eligible person or veteran as the result of (1) the willful or negligent failure of an educational institution to report, as required by this chapter or chapter 34 or 35 of this title and applicable regulations, to the Veterans' Administration excessive absences from a course, or discontinuance or interruption of a

course by the eligible person or veteran, or (2) false certification by an educational institution, the amount of such overpayment shall constitute a liability of such institution, and may be recovered, except as otherwise provided in section 1784 (b) of this title,in the same manner as any other debt due the United States. Any amount so collected shall be reimbursed if the overpayment is recovered from the eligible person or veteran. This section shall not preclude the imposition of any civil or criminal liability under this or any other law. Nothing in this section or any other provision of this title shall be construed as requiring any institution of higher learing to maintain daily attendance records for any course leading to a standard college degree.

38 U.S.C.3102 (d) Waiver of recovery of claims by the United States

(d) No certifying or disbursing officer shall be liable for any amount paid to any person where the recovery of

such amount is waived under subsection (a) or (b)

Colorado Revised Statute 23-60-303(2) (1973)

(2)The state board for community colleges and occupational education is designated as the state board for vocational education and declared to be the sole agency for purposes of compliance with said acts of congress and with any subsequent and future acts of congress requiring the designation of a state agency for the administration of the state plan of vocational education and for receiving and administering funds appropriated by the congress for programs of vocational education. The state board for community colleges and occupational education is also designated as the state approving agency pursuant to section 1771 of Title 38, United States Code.

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VETERANS ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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Washington, D.C. 20530

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners contend that the statutory liability of educational institutions for overpayments that the Veterans Administration makes to students is unconstitutional.

1. The Veterans Administration (VA) administers a statutory program of financial assistance to eligible veterans who are enrolled in a course of study approved by a state's "approving agency." See 38 U.S.C. 1771, 1772. Under the program, veterans

are paid directly by the VA as long as they are satisfactorily pursuing their studies. To ensure that only such students are paid, educational institutions must report to the Administrator of the Veterans Administration periodically on whether students are still satisfactorily enrolled, and the VA pays the schools a fee for this service. 38 U.S.C. 1784. If a school willfully or negligently fails to report to the Administrator the termination of a veteran's enrollment or other conditions leading to ineligibility for payment, and if the VA as a result continues to pay the student, the amount of the overpayment to the student may be recovered from the educational institution "in the same manner as any other debt due the United States." 38 U.S.C. 1785.[1]

States may participate in the VA's educational assistance program by designating an "approving agency" and by contracting with the VA to administer the program. The contract contains a provision requiring compliance with Chapter 36 of Title 38 of the United States Code (the chapter that contains 38 U.S.C. 1785) and VA regulations issued thereunder. The State of Colorado has designated the state board for community colleges and occupational education as the "state approving agency" under 38 U.S.C. 1771. Colo. Rev. Stat. § 23-60-303(2) (1973) (See Pet. App. 19). Colorado has also contracted with

[1] VA reimburses the school if the student subsequently returns the overpayment. 38 U.S.C. 1785.

the VA to administer the program (Supp. R. IV 22-41).[2]

Pursuant to Section 1785, the Veterans Administration notified certain schools in Colorado that they might be liable for overpayments due to their failure to keep the VA informed as to the status of named veteran students. Petitioners then brought this declaratory judgment action against the VA in the United States District Court for the District of Colorado, alleging that 38 U.S.C. 1785 is unconstitutional. Following a non-jury trial, the court rejected petitioners' claims and entered judgment for respondents. 430 F. Supp. 551 (1977). The court stated (*id.* at 558):

> Placing monetary liability for illegal payments on a party who holds the duty to monitor and report changes in student status—and thereby prevent overpayments—is rationally related to a legitimate government function. [Petitioners] assumed the obligation to monitor and report on student status when they participate in the VA educational benefits program. As a simple matter of a contractual duty flowing from the school to the state certifying agency to the VA, the schools can be held liable for overpayments. Under the terms of § 1785 [petitioners] will be held liable only when the overpayments are found to be the result of negligence or willfulness in reporting changes in status, or false certification of eligibility. There exists no constitutional infirmity in such a regulation.

[2] "Supp. R." refers to the supplemental record filed in the court of appeals.

> Congress clearly has the right to establish a procedure for disbursement of benefits to veterans and others through its enumerated power to raise and maintain an army and navy. The VA educational benefit program was thought necessary to encourage enlistments. Requiring those who voluntarily participate in the program to be responsible for the funds they cause to be disbursed is legitimate. Under the spending power itself, Congress has the authority to place limitations and liabilities on those who have a duty to prevent unauthorized payments and who, through negligence, allow illegal payments to be made.

The court of appeals affirmed (Pet. App. 1-13). It noted (*id.* at 5-6) that Colorado had adopted the Educational Assistance Program by statute and had contracted with the VA to implement the program, that "the duties of [petitioners] arose primarily from the contract entered into with the VA by Colorado" (*id.* at 6), and that the State's enabling statute was "a formal adoption of the Program with the statutory, contractual, and regulatory undertakings" (*id.* at 7).[3] It concluded (*ibid.*):

> The case is thus basically a matter of basic contract law, as the trial court indicated. When the issues are so examined, we find no substance to the [petitioners'] claim of interference with the educational process in Colorado, and no basis

[3] The Colorado statute designating the approving agency is captioned "[a]cceptance of congressional acts." Colo. Rev. Stat. § 23-60-303 (1973).

> for any claim of unconstitutionality. The trial court disposed of these contentions in its memorandum, and we agree with its analysis and conclusion on this issue.

2. The court of appeals correctly rejected petitioners' claim that 38 U.S.C. 1785 is unconstitutional. There is no conflict among the circuits on this question, and no need for further review by this Court.

Petitioners claim (Pet. 11-12) that the court of appeals' decision "binds non-recipient schools" in violation of the Constitution. But, as both lower courts found (Pet. App. 6; 430 F. Supp. at 558), the VA and the State of Colorado executed a contract providing for just such a result—that overpayments made to veterans as a result of the schools' willful or negligent reporting of the students' status would be a liability enforceable against the schools.[4] Whether Congress could have brought about such a result absent a contract between the parties is beside the point. The court below correctly concluded that the dispute was a matter of contract law, with no substantial constitutional overtones.

Thus, petitioners' claim that the decision below forces them to surrender constitutional rights and acquiesce in allegedly illegal regulations (Pet. 14) is frivolous. Any contract binds a party to do things that it is not otherwise required to do. Petitioners make no claim that the contract is invalid or that the VA is misconstruing it, and they point to no

[4] If the schools are ultimately found liable, the payments to the VA will come from state funds (R. 4).

"illegality" in the statute or regulations that is not answered by the fact that the State agreed, by signing the contract, to accept the obligations the statute imposes.

For this reason, petitioners fare no better with their claim (Pet. 12-15) that the decision below is in conflict with *National League of Cities* v. *Usery*, 426 U.S. 833 (1976). If, as petitioners contend, there is here an "intrusion into state managerial and fiscal matters" (Pet. 13), it is an "intrusion" justified by a contract that the State of Colorado voluntarily accepted.

Whether, and to what exent, petitioners are actually liable for any overpayment remains to be seen.[5] This action was for declaratory relief only; if and when the Veterans Administration brings suit against petitioners or any other party for recoupment of amounts paid to ineligible veterans, that party will have the opportunity to raise whatever defense it may have to the claim itself. What is clear at this point, and what both courts below held, is that petitioners have no basis to undermine a valid contract by claiming, in effect, that the VA would have no right to collect overpayments except for the contract.[6]

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[5] The "1,400 claims" that petitioners cite (Pet. 19) have been reduced by at least one-third (430 F. Supp. at 555). The two cases cited by petitioners (Pet. 19) have since been dismissed by stipulation of the parties and we are aware of no other case that presents this question.

[6] For example, petitioners claim (Pet. 18) that the decision below "could not be reached where a state has not created or designated a state approving agency. Thus, the Tenth Circuit's opinion draws a distinction between schools in states with an approving agency and those with none, which is arbitrary and improper." Because Colorado has created a state approving agency (see page 2, *supra*), it makes no difference whether a different result would have obtained in some state without one; and the "distinction," far from being "arbitrary and improper," is quite obviously a substantial distinction based on whether a state has agreed to be liable for overpayments.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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